

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. CERVANTES

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STATE OF NEBRASKA, APPELLEE,
V.
JESSE CERVANTES, JR., APPELLANT.

Filed August 21, 2012. No. A-11-1082.

Appeal from the District Court for Scotts Bluff County: LEO DOBROVOLNY, Judge.
Affirmed.

Todd Morten, of Island & Huff, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

IRWIN, SIEVERS, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Jesse Cervantes, Jr., appeals an order of the district court for Scotts Bluff County, Nebraska, convicting and sentencing him, inter alia, on a charge of use of a weapon in the commission of a felony. On appeal, Cervantes challenges the sufficiency of the evidence to support conviction on the charge of use of a weapon and challenges the district court's denial of a motion for mistrial. We find no merit to Cervantes' assertions on appeal, and we affirm.

II. BACKGROUND

The events giving rise to this case occurred on or about May 25, 2011. On that date, Evonne Prouty was inside a car parked on the street in Scottsbluff when she observed a green van drive past her and eventually park on the street near her. Prouty observed Cervantes exit the van, run across the street, and enter a house. She testified that she observed him putting what looked like two "carpenter knives" into his pocket; she described the knives as being "triangle at the top or whatever." She heard a commotion in the house, heard glass breaking and voices

yelling, and then saw Cervantes exit the house, return to the van, and leave the scene. Prouty then observed the victim, Nick Brown, exit the house and observed blood on him.

April Gilliam resided in the house. She testified that Cervantes entered the house and that he was holding “[s]ome knives . . . [t]wo knives in each hand.” She testified that Brown tried to run but that Cervantes “caught him before he could exit.” Gilliam testified that she observed Cervantes “slice [Brown’s] throat.” She also testified that, as he left, Cervantes told her that she “would be next if [she] said anything.” She testified that she observed cuts on Brown’s neck and observed “blood coming out of his shirt, his fingers.”

Officer Phillip Mosher of the Scottsbluff Police Department testified that he responded to a call to the police and discovered Brown with “several cuts on his body.” Brown was taken to a hospital by ambulance. Officer Mosher also testified about a series of seven photographs depicting various cuts to Brown’s hand, thumb, neck, elbow, and torso, as well as “poke marks” on his chest and his blood-stained shirt. Officer Mosher testified that he did not locate any weapons left behind.

Dr. Peter Meyer testified that he was the emergency room physician who treated Brown’s injuries. He testified that Brown suffered multiple lacerations that totaled 20 centimeters in length. According to Dr. Meyer, most of the lacerations were superficial, but some required stitches. He testified that the injuries were glancing or slicing injuries, as opposed to penetrating wounds, and that they were consistent with having been inflicted by a sharp object. Dr. Meyer testified that it took approximately 55 minutes to treat Brown’s injuries, although they were not deep enough to be life-threatening injuries.

Cervantes was charged by information with second degree assault, use of a deadly weapon in the commission of a felony, and terroristic threats. After a jury trial, Cervantes was convicted on all three counts, and the district court imposed sentences on each count. This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Cervantes has not raised any issues related to his convictions or sentences on the charges of second degree assault or terroristic threats. Cervantes assigns errors challenging the sufficiency of the evidence to support the conviction on the charge of use of a weapon in the commission of a felony and challenging the court’s denial of a motion for mistrial related to testimony of Gilliam.

IV. ANALYSIS

1. USE OF WEAPON

Cervantes first challenges the sufficiency of the evidence adduced to support his conviction on the charge of use of a weapon in the commission of a felony. Cervantes asserts that the district court erred in denying his motion for directed verdict at the conclusion of the State’s evidence and in finding the evidence sufficient to support the jury’s conviction on the charge. We find no merit to these assertions.

Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard of review is the same: In reviewing

a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011).

Cervantes was charged with use of a deadly weapon to commit a felony, pursuant to Neb. Rev. Stat. § 28-1205(1)(a) (Cum. Supp. 2010). That section provides that “[a]ny person who uses a firearm, a knife, brass or iron knuckles, or any other deadly weapon to commit any felony which may be prosecuted in a court of this state commits the offense of use of a deadly weapon to commit a felony.” Pursuant to § 28-1205(1)(b), use of a deadly weapon other than a firearm is a Class II felony offense.

Cervantes argues that there was insufficient evidence to demonstrate that the instrument he used was a “knife” as that term is defined in the statutes and that there was no additional evidence to demonstrate that the instrument he used was a “deadly weapon.” He argues that because the evidence was insufficient to demonstrate that the instrument he used was a “knife” as that term is defined in the statutes, the State was obligated to present additional evidence to establish that the instrument was a “deadly weapon.” We find no merit to that argument and conclude that there was sufficient evidence to support a finding that Cervantes used a “knife” as that term is used in the statutes.

Neb. Rev. Stat. § 28-1201(5) (Cum. Supp. 2010) specifically defines “knife” to mean “any dagger, dirk, knife, or stiletto with a blade over three and one-half inches in length or any other dangerous instrument capable of inflicting cutting, stabbing, or tearing wounds.” There is no dispute in the present case that the State presented no evidence to establish that the instrument used by Cervantes and described as a knife by multiple witnesses had “a blade over three and one-half inches in length.” As such, there is no dispute that the evidence was insufficient to demonstrate that the instrument was a “knife” under that portion of the definition in § 28-1201(5).

The State asserts that the evidence was sufficient, however, to support a finding that the instrument was a “knife” under the remainder of the definition in § 28-1201(5) as “any other dangerous instrument capable of inflicting cutting, stabbing, or tearing wounds.” See *State v. Bottolfson*, 259 Neb. 470, 610 N.W.2d 378 (2000) (indicating § 28-1201(5) allows item to be considered “knife” if it is capable of inflicting cutting, stabbing, or tearing wounds). We agree.

The testimony adduced in this case established that two different witnesses described the instruments in Cervantes’ hands as “knives” or as “carpenter knives.” Prouty described the instruments as having a “triangle at the top.” The evidence also established that Brown suffered multiple injuries that were described as “cuts,” “lacerations,” or “slicing-type wounds.” Gilliam testified that she observed Cervantes “slice” Brown’s throat. Thus, there was evidence establishing that Cervantes used an instrument described as a knife and that the instrument was capable of inflicting cutting wounds--indeed, the instrument, as used by Cervantes, actually did inflict a variety of cutting wounds.

Cervantes argues that because the State failed to demonstrate that the instrument was a knife with a blade of at least 3½ inches, the State was required to separately demonstrate that it

was “capable of causing serious bodily injury or death in the manner it was used.” Brief for appellant at 8. We disagree.

In *State v. Williams*, 218 Neb. 57, 352 N.W.2d 576 (1984), and *State v. Valencia*, 205 Neb. 719, 290 N.W.2d 181 (1980), the Nebraska Supreme Court addressed a similar issue in the context of charges of carrying a concealed weapon. In those cases, the Supreme Court noted that in Neb. Rev. Stat. § 28-1202(1) (Reissue 1979), the Legislature had set forth a variety of weapons that were considered “deadly weapons per se,” including a “‘revolver, pistol, bowie knife, dirk or knife with a dirk blade attachment, [or] brass or iron knuckles’” such that concealing them about the person constituted an offense without any regard to the manner of the actual or intended use of the weapon. *State v. Williams*, 218 Neb. at 59, 352 N.W.2d at 578. Accord *State v. Valencia*, *supra*. Section 28-1202 further provided, however, that it was also an offense to conceal about the person any other deadly weapon. The Supreme Court held that, with reference to other weapons beyond those specifically enumerated, they could be determined to be deadly weapons only if the manner in which they were used, or intended to be used, was capable of producing death or serious bodily injury. *State v. Williams*, *supra*; *State v. Valencia*, *supra*. See, also, Neb. Rev. Stat. § 28-109 (Reissue 1979).

In *State v. Williams* and *State v. Valencia*, the Nebraska Supreme Court concluded that the statutory definition of “deadly weapon” contained in § 28-109 controlled in determining whether a defendant was guilty of carrying a concealed weapon when the instrument allegedly concealed was outside the scope of weapons specifically enumerated in § 28-1202. Although the offense at issue in those cases was different than the offense for which Cervantes was charged and convicted, we find the Supreme Court’s analysis in those cases to be illustrative and to support the conviction in the present case.

In the present case, § 28-1205(1)(a) enumerates specific weapons that the Legislature has determined amount to deadly weapons per se. That list of enumerated weapons specifically includes a “knife.” Under the reasoning of *State v. Williams*, *supra*, and *State v. Valencia*, *supra*, if the instrument Cervantes used was one of the enumerated weapons, there is no need for the State to separately demonstrate that the instrument was capable of producing death or serious bodily injury. In this case, as established above, the instrument used by Cervantes in assaulting Brown was one of the enumerated weapons because it was a knife capable of inflicting cutting wounds. There is no merit to Cervantes’ assertion that the State was required to adduce additional proof.

2. MISTRIAL AND/OR NEW TRIAL

Cervantes also asserts that the district court erred in denying his motion for mistrial related to a statement made during the testimony of Gilliam and that the court erred in denying his motion for new trial on the basis of the same statement. Because we find that the court immediately sustained an objection to the statement and provided a limiting instruction directing the jury to disregard the statement, we find no abuse of discretion.

The decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion. *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001), *modified* 261 Neb. 623, 633 N.W.2d 890; *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). Error cannot ordinarily be predicated on the failure to grant a

mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material. *State v. Quintana, supra*; *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999). The defendant must prove that the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice. *Id.* Ordinarily, when an objection to or motion to strike improper evidence is sustained and the jury is instructed to disregard it, such instruction is deemed sufficient to prevent prejudice. *Id.*

In the present case, during Gilliam's testimony, she was asked by the State if she knew Cervantes. She answered, "Yes." She was then asked how long she had known him, and she answered, "Two, three years." The State then asked Gilliam, "How do you know him?" She responded, "Through drug-related history."

Cervantes' counsel immediately objected to Gilliam's statement referring to "drug-related history," and the district court immediately sustained the objection and instructed the jury to "disregard the drug history comment that [Gilliam] made." We find no abuse of discretion by the court in denying the motion for mistrial, nor do we find an abuse of discretion by the court in denying the motion for new trial on the same basis. The objection was sustained, and the jury was instructed to disregard the improper statement. Cervantes' assignment of error is without merit.

V. CONCLUSION

We find no merit to Cervantes' assertions of error. The evidence was sufficient to support a finding by the finder of fact that Cervantes used a "knife" to commit the felony assault in this case, and there was no abuse of discretion by the district court in denying Cervantes' motions for mistrial and new trial based on a statement made during testimony. We affirm.

AFFIRMED.